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IN THE

Supreme Court of the United States

LUIGINO'S, INC.,

Petitioner,

v.

IBP, INC. and ROBERT PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, please refer to Petitioner's Petition for Writ of Certiorari, filed on June 30, 2003, for the appropriate disclosure.

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REPLY BRIEF FOR PETITIONER

I. THERE ARE COMPELLING REASONS FOR GRANTING CERTIORARI IN THIS MATTER.

This case falls squarely within the type of case for which certiorari should be granted.[1] As described in the Petition, this matter is an excellent example of the widespread variations and improper expansive use of Federal Rule of Civil Procedure 56, and the misinterpretation of this Court's decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), practices that, as in this case, intrude upon the

[1] Section II of Respondents' Opposition Brief focuses solely on the alleged deficiencies in Luigino's argument that the conflict between the Circuit Courts' application of Federal Rule of Civil Procedure 56 justifies a grant of certiorari. Br. Opp. pp. 12-21. Luigino's stands by the argument in its Petition and simply reincorporates it at this point. Luigino's, however, presented other grounds for a grant of certiorari throughout its Petition, including this Court's power and responsibility to assure the proper administration and application of Federal Rule 56, *see* Pet. pp. 8, 28, which is more fully discussed herein.

Seventh Amendment jury trial right.[2] The proper interpretation and administration of the Federal Rules (including Rule 56), which is critical for the proper functioning of the federal civil justice system, should command and has commanded this Court's attention on numerous occasions. *See, e.g., Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204 (1958)(certiorari is proper to resolve important questions as to the proper application of the Federal Rules); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706 (1927)(certiorari is appropriate on issues concerning the construction and application of the Federal Rules); *Matsushita, supra*; *Anderson, supra*; *Celotex, supra*; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 454 (1992)(granting certiorari to address the summary judgment standard in an antitrust controversy); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (granting certiorari to address the summary judgment standard in a race discrimination case involving burden shifting); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002)(granting certiorari to address Federal Rule 8 pleading requirements); *Conley v. Gibson*, 355 U.S. 41, 44, 47-48 (1957)(same); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964)(granting certiorari to address Federal Rule 35 physical and mental examinations); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 4 (1941)(granting certiorari to address the validity of Federal Rules 35 and 37). *See also* 28 U.S.C. § 2072(a)(this Court has the power to prescribe general rules of practice and procedure for cases in the district courts and courts of appeals)

The use of certiorari is particularly appropriate when the application of a Rule implicates important matters such as the ability to reach trial and the right to trial before a jury. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1958) this

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[2] Contrary to the assertion at Br. Opp. pp. 1, 13, Luigino's has consistently maintained throughout the summary judgment proceedings and on appeal that Luigino's claims should have been submitted to a jury.

Court granted certiorari and stated:

> We grant certiorari . . . because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'

Id. at 501(quoting *Dimick v. Schiedt*, 293 U.S. 474 (1935)). These cases make it clear that there are compelling reasons for this Court to grant certiorari in this matter.

II. THE ARGUMENTS IN RESPONDENTS' BRIEF IN OPPOSITION ACTUALLY SUPPORT GRANTING CERTIORARI IN THIS CASE.

Predictably, Respondents devote much of their Brief in Opposition trying to convince the reader that there are no genuine issues of material fact or evidence of causation and, thus, summary judgment was proper. In their view, this Court need not concern itself with the application of *Matsushita*, *Anderson*, and *Celotex*, or the administration of Rule 56, by the federal courts. They do this first by their inaccurate statement of facts and then by their bald—but false—assertion that Luigino's presentation on the causation issue was properly decided as a matter of law because Luigino's failed to present any evidence on the point. Both techniques are designed to obscure the compelling reasons for granting Luigino's Petition.

A. The inaccuracies in Respondents' statement of facts demonstrate that this matter should not have been adjudicated on summary judgment.

Respondents' Statement of Facts mischaracterizes the facts and certainly does not construe all inferences in favor of Luigino's. Yet, it does show that there were genuine issues of material fact that should have precluded the entry of summary judgment. For example, Respondents' Brief

incorrectly maintains that it was undisputed that Luigino's did not want to enter into the market for "Mexican" retail branded frozen entrées, and that *Howlin' Coyote* was "Southwestern," which Luigino's sharply distinguished from Mexican. Br. Opp. pp. 3-4. Clearly, however, the presentation given to Luigino's Board in July, 1999, which apparently was discounted by the district court (*see* App. 20a), unequivocally demonstrated that Luigino's was pursuing its *Howlin' Coyote* line, which Luigino's considered to be a premium subset of Mexican. This issue was critical to whether Mexican retail branded frozen entrées was a corporate opportunity of Luigino's, which Luigino's was required to show prior to the burden shifting to Respondents under Minnesota law. *Miller v. Miller*, 222 N.W.2d 71, 82 (Minn. 1974); *Honn v. Coin & Stamp Gallery, Inc.*, 407 N.W.2d 419, 422-23 (Minn. App. 1987). The district court should have considered this fact and resolved inferences arising from it in favor of Luigino's.

Respondents also incorrectly maintain that Luigino's knew that IBP's Mexican products were sold at retail. Br. Opp. pp. 2. Although some IBP products were sold in certain retail outlets such as convenience stores, IBP did not sell its products in the frozen entrée section of grocery stores and supermarkets. Further, during the negotiations for the potential purchase of Luigino's, IBP repeatedly maintained that it was not in the same business at Luigino's. Thus the record on the summary judgment motion presented a triable issue on the material fact of Luigino's knowledge.

Finally, Respondents incorrectly state that the plans for *Howlin' Coyote* discussed at Luigino's July, 1999, Board meeting were either truncated or non-existent. Br. Opp. pp. 4-5. There was record evidence, however, including the testimony of Larry Nelson that demonstrates that a detailed PowerPoint presentation was given at the Board meeting, which the district court improperly characterized as "dim" (*see* App. 20a). This issue was material because, in order to

show corporate usurpation or misappropriation, Luigino's must have introduced evidence that Peterson or IBP was exposed to Luigino's plans for *Howlin' Coyote*.

These are some of many examples[3] of the district court improperly weighing evidence, drawing inferences in favor of Respondents, rather than in favor of Luigino's, and failing to acknowledge the existence of genuine issues of material fact.[4] By repeating this improper process, Respondents are perpetuating the errors committed below. Ironically, this graphically illustrates why guidance on the application of Rule 56 is so needed from this Court at this time.

B. Luigino's has introduced ample evidence of causation on its claims against respondents.

Respondents attempt to get this Court to believe that Luigino's **sole** evidence of causation was the existence of similar conduct involving two third parties, C&F Packing Co. and Don Miguel.[5] Br. Opp. p.10. This is simply wrong and disregards the following evidence supporting causation:

1. Prior to the contract between IBP and Luigino's that gave rise to this litigation, and up until *José Olé* was launched in spring, 2000, IBP, through its subsidiary, SBI, sold various low-end hand-held Mexican products through its Posada, Little Juan, Marquez, and Pacific Tortilla Kitchen lines. Those products included individually wrapped

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[3] Unfortunately, page limitations do not permit a detailed analysis of all of Respondents' factual inaccuracies in their Brief.

[4] This also shows the injustice of the lower courts' apparent acceptance of "trials by affidavit" in complex cases, where the facts are left to counsel's "spin" in briefs—with no opportunity to cross-examine the witnesses before the factfinder.

[5] Respondents also mistakenly assert that Luigino's sole evidence of causation is the disparity between the testimony of Peterson and IBP'S CFO regarding whether Peterson told anyone at IBP about Luigino's. Br. Opp. p. 10, n 3.

burritos, wraps, chimichangas, and packaged taquitos, and were primarily sold in the "foodservice" distribution channel. Neither IBP nor SBI ever sold those products in the separate market known as retail branded frozen entrée products in the frozen entrée section of grocery stores and supermarkets.

2. In early 1998, IBP, through SBI, decided to repackage its various low-end, hand-held products under an umbrella brand. These plans did not contemplate the entry into the retail branded frozen entrée market in grocery stores and supermarkets.

3. In 1998, in connection with the potential purchase of Luigino's, IBP was exposed to Luigino's Confidential Memorandum, which detailed trade secret, confidential and/or proprietary information regarding Luigino's lines of retail branded frozen entrée products sold in the frozen entrée section of grocery stores and supermarkets.

4. In January 1999, Peterson joined Luigino's Board of Directors. Peterson deposed that he did not do so to assist Luigino's in its operations, but rather to benefit IBP.

5. During Luigino's July, 1999, Board meeting, Peterson was exposed to Luigino's trade secret, confidential and/or proprietary plans for *Howlin' Coyote*, a premium line of Mexican/Southwestern retail branded frozen entrée products to be sold in grocery stores and supermarkets. Peterson was informed, among other things, of Luigino's discovery that there was a void in the market for a line of premium Mexican and/or Southwestern retail branded frozen entrée products sold in grocery stores and supermarkets, and that there was a consumer desire for such a product line. Peterson was informed of how Luigino's would capture this market, during the July, 1999, Board meeting and in subsequent mailings.

6. In October, 1999, less than three months after Peterson was informed of Luigino's plans for *Howlin' Coyote*, IBP prepared a Request for Appropriation for $8

million to develop a new premium Mexican brand to be sold in the retail, branded frozen entrée section of grocery stores and supermarkets, a completely new market for IBP.

7. At no time did Peterson inform Luigino's about the existence of or impending launch of *José Olé*.

8. *José Olé* was launched in the spring of 2000. Many of the new *José Olé* frozen branded retail entrée products are literally identical to the *Howlin' Coyote* products presented to Peterson at Luigino's July, 1999, Board meeting.

9. *José Olé* is sold side by side with Luigino's products in the frozen entrée section of grocery stores and supermarkets.

10. Luigino's frozen food industry expert opined that IBP probably used the information it learned from Luigino's, including the consumer acceptability of premium Mexican entrées and the importance of being a first mover in the market, to develop and launch the *José Olé* line.[6]

11. When questioned about whether he told anyone at IBP about Luigino's *Howlin' Coyote* plans, a question highly relevant to causation, Peterson deposed that he did not disclose anything about *Howlin' Coyote* to anyone at IBP. IBP's CFO, however, testified exactly to the contrary.

12. On two occasions, IBP was accused of misappropriating food industry intellectual property or trade secrets; one resulted in a $10.9 million judgment against IBP and the other involved IBP's *José Olé* logo. Pet. pp. 5-6, n 2.

This evidence, when viewed in is entirety as should be done on a summary judgment motion, rather than in bits and pieces (*see, e.g., Matsushita*, 475 U.S. at 587; *In re: High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 657 (7th

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[6] The district court refused to consider the testimony of experts in ruling on the summary judgment motions. App.15a, n 2.

Cir. 2002); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 505 (6th Cir. 1996); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993), would have allowed reasonable jurors to find in favor of Luigino's on the issue of whether Respondents' acquisition of Luigino's trade secrets and/or confidential information wrongfully assisted IBP's launch of *José Olé*. *See also Wager v. Hall*, 83 U.S. 584, 601-602 (1872)(direct proof of fraudulent acts is not common and circumstantial evidence that may be inconclusive if separately considered, may be sufficient if considered together to constitute conclusive proof, especially when corroborated by moral coincidences). This is reinforced by the fact that, under Minnesota law, causation is generally an issue of fact, and, being the governing law, should have been applied by the courts below. *See, e.g., Commercial Property Investments, Inc. v. Quality Inns, Int'l, Inc.*, 938 F.2d 870, 878 (8th Cir.1991); *Raach v. Haverly*, 269 N.W.2d 877, 880 (Minn. 1978); *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 290 (Minn. App. 1997); *Hamilton v. Independent School Dist. No. 114*, 355 N.W.2d 182, 184 (Minn. App. 1984).

Finally, Respondents contend that Luigino's failed to show causation because it did not show that it lost sales due to IBP's launch of *José Olé*. Br. Opp. pp. 8, 9. This is incorrect for two reasons. First, in a corporate usurpation setting, damages need not be computed by determining the amount of sales lost. The damages may be the value of the thing taken. *See, e.g., Diedrick v. Helm*, 14 N.W.2d 913, 921 (Minn. 1944)(the aggrieved corporation may seek a money judgment for the value of the thing diverted); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Sup. Ct. 1939)(the law imposes a constructive trust for the corporation's benefit that "does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence"); 19 C.J.S. Corporations § 510 (1990)(when a director breached the fiduciary duty, "it is immaterial that the corporation was not damaged by the transaction").

Second, and more importantly, the district court's finding that Luigino's did not introduce evidence of causation was not based on Luigino's alleged failure to show that *José Olé* caused Luigino's damages, to the exclusion of other factors. Rather, it was based on its conclusion, resulting from its improper factfinding, that there was no evidence of a causal connection between Respondents' acquisition of Luigino's trade secrets and/or confidential information and the launch *José Olé*. App. 15a, n 2.[7]

III. THE LOWER COURTS DID NOT PROPERLY SHIFT THE BURDEN OF PROOF TO RESPONDENTS ON LUIGINO'S CLAIM FOR CORPORATE USURPATION.

Not surprisingly, Respondents do not address the fact that, under Minnesota law, the burden of persuasion to show good faith shifted to Respondents after Luigino's introduced evidence that Peterson had a duty to Luigino's and that Luigino's had the capacity to enter into the retail market for premium Mexican and/or Southwestern frozen entrées sold in grocery stores and supermarkets. *See Miller*, 222 N.W.2d at 82 (Minn. 1974); *Honn*, 407 N.W.2d at 422-23 (Minn. App. 1987). This is critical because, under Minnesota law, Luigino's need not prove "causation" (i.e., evidence of a causal connection between the acquisition of Luigino's trade secrets and/or confidential information and the launch *José Olé*) to establish liability for Respondents' corporate usurpation. If the corporation seeks a money judgment for the value of what was usurped, "[i]t makes no difference . . . that the corporation's assets were misused . . . ." *Diedrick*, 14 N.W.2d at 921. Although a burden of persuasion topic of Minnesota law, this issue is critical to the proper administration of Rule 56.

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[7] Most of the direct evidence of this causation element was in the sole possession of Respondents.

Federal courts must follow the forum state's substantive law in diversity cases. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As this Court has held, a federal court must follow that state's burdens of persuasion, *see Palmer v. Hoffman*, 318 U.S. 109, 116 (1943), and view the evidence presented on a summary judgment motion through the prism of the applicable evidentiary burden, *Anderson*, 477 U.S. at 254. Minnesota substantive law regarding corporate usurpation required shifting the evidentiary burden to the Respondents to show good faith, because Minnesota law recognizes that most or all of the evidence needed by a plaintiff to show bad faith is likely to be in the defendant's possession or control. *Miller*, 222 N.W.2d at 82. The courts below clearly misapplied the teachings of *Palmer* and *Anderson*. This Court should make clear that the issue of whether genuine issues of fact exist must be evaluated not only through the applicable evidentiary burden, but also by following the state's burden shifting analysis, especially when that reflects the forum state's judgment regarding a matter of substantive law of policy. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-28 (1996).

CONCLUSION

For the foregoing reasons and those stated in the Petition, its is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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